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No. 82-1448

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner,

v.

STAUFFER CHEMICAL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S MEMORANDUM IN OPPOSITION

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March 23, 1983

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QUESTIONS PRESENTED *

1. Whether EPA is collaterally estopped from relitigating in this case from the Sixth Circuit, based on an administrative search warrant issued respecting a plant in Tennessee, a question of statutory interpretation which the Tenth Circuit had resolved against EPA in earlier litigation between the identical parties, based on a comparable warrant issued regarding a plant in Wyoming.

2. Whether EPA has power under Section 114(a)(2) of the Clean Air Act to designate private contractors as its "authorized representatives" for purposes of obtaining and executing administrative search warrants.

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* These questions have been restated from those set out in the petition.

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RESPONDENT'S MEMORANDUM IN OPPOSITION

Respondent Stauffer Chemical Company ("Stauffer")[1] opposes the petition for writ of certiorari.

STATEMENT

Both in this case (*"Stauffer II"*) and in an earlier litigation between the same parties (*"Stauffer I"*),[2] EPA obtained and sought to execute warrants enabling private contractors to enter and inspect Stauffer's plant premises. At issue are principles at the core of the doctrine of collateral estoppel. The identical question of statutory construction presented in this case was raised,

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, Stauffer's non-wholly owned subsidiaries and affiliates are set forth *infra*, at Appendix A.

[2] *In re Stauffer Chemical Co.*, 14 Env't Rep. Cas. (BNA) 1737 (D. Wyo. 1980), *aff'd sub nom. Stauffer Chemical Co.* v. *EPA*, 647 F.2d 1075 (10th Cir. 1981).

argued at length, and decided adversely to petitioner ("Environmental Protection Agency" or "EPA") in *Stauffer I*.

The administrative search warrant in *Stauffer I* was issued on May 8, 1980, by a federal magistrate in the United States District Court for the District of Wyoming.[3] It authorized designated EPA officials and employees of EPA's contractor, GCA Corporation ("GCA"), to enter and inspect Stauffer's phosphate ore processing plant located at Leefe (near Sage), Wyoming. Two EPA officials and two GCA employees sought to execute the warrant on the morning of May 13, 1980. They were accompanied by a state official.[4] Stauffer's plant manager told the EPA and state officials that they were welcome to conduct the inspection but refused entry to the GCA employees absent an agreement to protect trade secrets. The EPA officials decided not to conduct the inspection themselves, and the EPA and GCA group departed. Stauffer immediately moved in federal district court to quash the warrant and also sought a temporary restraining order enjoining execution of the warrant. The court granted such an order on the same day, May 13, 1980.

Thereafter, a two-day evidentiary hearing was held in the district court, and on June 23, 1980 the court entered judgment quashing the warrant and enjoining EPA from causing its private contractors to enter Stauffer's plants in Wyoming to conduct inspections. The court's ruling was premised on alternative grounds: *first*, that EPA had no authority under Section 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2), to designate private contractors as its "authorized representatives" for

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[3] This recitation of facts regarding *Stauffer I* is adapted from the findings of fact made by the district court, reported at 14 Env't Rep. Cas. (BNA) 1737-1740.

[4] The inspection was to be made in connection with EPA's "compliance evaluation oversight program" (14 Env't Rep. Cas. (BNA) 1739, ¶ 14), for the purpose of auditing state enforcement and inspection procedures. *Id.*

purposes of entry and inspection; and *second*, that in the particular circumstances EPA's use of an *ex parte* procedure to obtain the administrative search warrant from the federal magistrate violated principles of fundamental fairness. On August 19, 1980, EPA filed notice of its appeal to the Tenth Circuit.

After the Wyoming federal court's decision but before EPA's appeal from that decision was filed, EPA sought from a federal magistrate sitting in Nashville, Tennessee, a similar administrative search warrant for a contractor to enter and inspect another Stauffer plant.[5] The warrant was issued on August 7, 1980, and authorized EPA to use a contractor, PEDCO Environmental, Inc. ("PEDCO"), to conduct an oversight inspection at a Stauffer elemental-phosphorus plant located in Mount Pleasant, Tennessee. On that same day, an EPA official and two PEDCO employees arrived at the plant to make the inspection. A Tennessee official accompanied them. Again, Stauffer's plant staff welcomed inspection by the EPA and Tennessee officials but refused to allow entry by PEDCO's employees in the absence of a written agreement to protect trade secrets. No inspection was made. On the following day, EPA filed in federal district court a petition for an order to show cause why Stauffer should not be held in contempt, and Stauffer filed a motion to quash the warrant and an application for a temporary restraining order barring its execution. The petition and motion were consolidated by the district court. Stauffer's application for a temporary restraining order was mooted by EPA's agreement not to seek to execute the warrant pending the court's decision on the cross-motions.

On April 17, 1981, the Tennessee federal district court denied Stauffer's motion to quash and also denied EPA's contempt petition on the ground that "Stauffer legiti-

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[5] This recitation of facts regarding *Stauffer II* is taken from the opinion of the district court, reported at 511 F. Supp. 744, 745 and reprinted at Pet. App. 44a, 45a.

mately believed that private contractors were not authorized representatives under the Clean Air Act" to perform inspections. (Pet. App. 56a; 511 F. Supp. 750.) Stauffer promptly appealed, and after the district court refused to stay its decision and execution of the warrant pending appeal, Stauffer obtained a stay to that effect from the Sixth Circuit.

On May 8, 1981, three weeks after the Tennessee federal district court's decision, the Tenth Circuit affirmed the Wyoming federal district court's decision quashing the warrant there at issue and enjoining EPA from using contractors to make inspections at Stauffer's plants in Wyoming. *Stauffer Chemical Co.* v. *EPA*, 647 F.2d 1075 (10th Cir. 1981). The Tenth Circuit's decision rested squarely and solely on the ground that private contractors were not "authorized representatives" of EPA for purposes of Section 114(a)(2) governing administrative searches. EPA unsuccessfully sought rehearing but did not file a petition for certiorari in this Court.[6]

Stauffer's appeal to the Sixth Circuit was decided on July 7, 1982. The court of appeals reversed the Tennessee federal district court, adopting two alternative grounds for its decision that the warrant should have been quashed. Each of the three judges wrote separately. Judge Weick, joined by Judge Jones, concluded that EPA was collaterally estopped from obtaining a warrant authorizing a private contractor to make an inspection, because of the prior decision in *Stauffer I* as affirmed by

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[6] Because the Wyoming federal court in *Stauffer I* based its holding on alternative grounds, for purposes of collateral estoppel its judgment was not necessarily conclusive as to either of the grounds standing alone. *See Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158, 1168-73 (5th Cir. 1981); *Restatement (Second) of Judgments* § 27, comment i (1980). However, when the Tenth Circuit upheld the Wyoming federal district court's interpretation of the Clean Air Act, the judgment then definitely became conclusive as to that ground. *See Hicks* v. *Quaker Oats Co., supra; Restatement, supra,* comment o.

the Tenth Circuit. (Pet. App. 8a-13a, 34a-38a; 684 F.2d 1179-81, 1190-92.) District Judge Siler, sitting by designation, did not agree that the doctrine of collateral estoppel applied. (Pet. App. 39a-41a; 684 F.2d 1192-93.) Judge Siler joined Judge Weick, however, in concluding that Section 114(a)(2) of the Act did not permit EPA to designate contractors as its representatives for purposes of entry and inspection. (Pet. App. 39a; 684 F.2d 1192.)[7] Judge Jones did not reach this issue of statutory construction because of his expressed view that, as to Stauffer, EPA was collaterally estopped from rearguing the issue. (Pet. App. 34a; 684 F.2d 1190.) Each judge thus joined in the result, and Judge Weick's opinion spoke for a majority of the court on each of the two alternative holdings.

A petition for rehearing and rehearing *en banc* was denied.[8]

REASONS FOR DENYING THE PETITION

A. The Sixth Circuit Properly Invoked Principles At The Core Of The Doctrine Of Collateral Estoppel

The collateral estoppel prong of the Sixth Circuit's decision rests squarely on principles at the core of the doctrine of collateral estoppel. In the Wyoming federal district court and the Tenth Circuit, EPA fully and fairly

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[7] Subsequent to the decision of the Tenth Circuit on the statutory-construction question, the Ninth Circuit had ruled in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (9th Cir. 1981), that EPA was empowered by Section 114(a)(2) of the Act to designate private contractors as its representatives for purposes of entry, search, and inspection. Judge Weick's opinion (in this respect for himself and Judge Siler) acknowledges and discusses the direct conflict in decisions between *Stauffer I* and *Bunker Hill*, criticizes the Ninth Circuit decision in *Bunker Hill*, and comes down squarely in agreement with the Tenth Circuit in *Stauffer I*. (Pet. App. 15a-21a; 684 F.2d 1182-89.)

[8] The court's opinion denying rehearing is reported at 684 F.2d at 1193. *Compare* Petition at 1.

litigated with Stauffer the question of EPA's power to designate private contractors to enter, search, and inspect plants, and EPA lost. If collateral estoppel is ever to be applied in a suit by the government against a private litigant, it should be applied here; the subsequent action originating in Tennessee federal district court involved precisely the same question and the same parties.

This Court has outlined the policies behind collateral estoppel as follows:

> To preclude parties from contesting matters that they have a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.
>
> *Montana* v. *United States*, 440 U.S. 147, 153-54 (1979).

These policies are reflected in the description of the doctrine of collateral estoppel found in the *Restatement (Second) of Judgments* § 27 (1980):

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

No question has been raised here or in the Sixth Circuit concerning (1) EPA's full and fair opportunity to litigate in the Wyoming federal district court and the Tenth Circuit, (2) the actual litigation of the statutory contractor-search question in those courts, (3) the determination of the question in a valid and final judgment by those courts, and (4) the essentiality of such determination to the judgment of the Wyoming federal district court as affirmed by the Tenth Circuit.[9]

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[9] See *supra*, at 4 n.6.

Most importantly, the parties to both cases are the same. Such mutuality of parties to successive litigation is no longer a prerequisite for invocation of issue preclusion by way of collateral estoppel. *See Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326-328 (1979). Mutuality nonetheless remains an important consideration in applying collateral estoppel in a particular case. *See American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare*, 677 F.2d 118, 121 n.24, 124 (D.C. Cir. 1981).[10]

This also is an instance of defensive use of collateral estoppel. Stauffer has sought to prevent EPA from asserting a purported right (to designate contractors as its representatives for purposes of entry, search, and inspection) which EPA has previously litigated and lost against Stauffer. *See Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.4 (1979). Stauffer ought not to be forced to litigate precisely the same question over and over again. In the circumstances, Stauffer faced not only the expense of relitigation but the risk of a contempt citation for refusing to obey the warrant.

In *Montana* v. *United States*, *supra*, the foregoing fundamental principles were fully recognized, and collateral estoppel was applied against the government. This Court held that, like any other litigant, the government could not bring multiple lawsuits against the same party in the hope that it might eventually find a court that accepted the government's arguments. EPA's petition essentially amounts to a request that the Court overrule *Montana*.

EPA attempts to avoid the direct application of *Montana* by suggesting that "special circumstances," 440 U.S.

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[10] The *Restatement (Second) of Judgments* continues to separate principles relating to relitigation "between the parties" (§§ 27, 28), and "Issue Preclusion in Subsequent Litigation with Others" (§ 29, heading). Section 29 of the *Restatement* sets out additional considerations which should be addressed before invoking collateral estoppel in situations where mutuality is not present.

at 155, are present in this case, which warrant an exception to the otherwise normal application of collateral estoppel. The "special circumstance" suggested by EPA is the government's interest in relitigating important questions of public law that have general applicability to broad classes of persons or businesses. For support, EPA relies heavily on the opinion of the Court of Appeals for the District of Columbia Circuit in *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare*, 677 F.2d 118 (D.C. Cir. 1981).

In *American Medical*, the court did recognize the interest of the government in relitigating questions of law, when such questions are raised in subsequent suits against *different* parties than those who were present in the court where the issues were first joined. In the *American Medical* case, however, the court noted that the situation was different when the subsequent litigation was between the same parties:

> The foregoing analysis intercepts only parties who did not participate in the initial suit. If the Government is litigating with the same adversary in both cases, an estoppel will petrify the law only as to that one party—obviously not an unjust result—and accordingly will work no preclusion generating national shockwaves.
>
> Id. at 124.

The only reason that the court did not allow estoppel in *American Medical* was that the private party in the original suit had subsequently merged with another defendant in the second case. Applying estoppel, therefore, would have resulted in using different rules of law for different subsidiaries of the same corporation, an obviously unacceptable result. No such problem exists here.

The Sixth Circuit in this case likewise considered the special interest of the government in relitigating legal

questions and refused to give it dispositive weight.[11] As Judge Jones noted in his concurring opinion:

> While I do not favor precluding a federal agency's ability to test its policy decisions in more than a single circuit, in circumstances where the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment, the equities favor application of collateral estoppel and not its abdication.
>
> (Pet. App. 38a; 684 F.2d 1192.)

And in *Montana* itself, while not directly addressing the question, the Court did not recognize any overriding governmental interest, but rather pointed significantly to the generally applicable considerations bearing on invocation of collateral estoppel. *See Montana* v. *United States*, *supra*, 440 U.S. at 153-54.

In sum, if the position pressed here by the government is accepted, the proffered exception will swallow the rule, and collateral estoppel will never again be available to cut off successive suits by the government involving issues of law. The government may always argue that its position in a case is of national legal significance. In *Montana*, for instance, the government's suit was based on the Fourteenth Amendment and the Supremacy Clause.

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[11] The Sixth Circuit did not fail to consider the Supreme Court cases that approve of agency relitigation. *See, e.g., E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977); *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975). Judge Jones' opinion particularly noted key distinctions between those cases and this one: relitigation in those cases involved "different parties as opposed to the *same* party," and this case involves a defensive rather than offensive use of collateral estoppel. (Pet. App. 38a; 684 F.2d 1191-92 (emphasis in the original).) In comparable circumstances, these distinctions have been applied by other courts of appeals to reach the conclusion that the government should be estopped. *See United States* v. *ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980); *Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979); *Starker* v. *United States*, 602 F.2d 1341 (9th Cir. 1979).

Certainly those issues are as important as a question of statutory construction under the Clean Air Act.

B. The Sixth Circuit Correctly Concluded That EPA Could Not Designate Private Contractors To Enter, Search, And Inspect Plants

The controversy at the heart of this case turns on the meaning of the phrase "authorized representative" in Section 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2). That section provides generally that "the Administrator [of EPA] or his authorized representative" may enter, search, and inspect premises subject to regulation under the Act. The Sixth Circuit, after a careful and painstaking review of all relevant considerations, reached the correct result when it held that a private contractor could not be such an "authorized representative." [12]

The function and purpose of a statute have important roles to play in statutory construction. *See NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981). That role is particularly appropriate in a case such as this, where the phrase in question has not been defined in the Clean Air Act, and the controversy over its meaning cannot be resolved on the face of the Act.[13]

The Sixth Circuit carefully and precisely parsed the provisions of Section 114(a)(2), considering especially the language of that particular statutory paragraph, the legislative history, other related portions of the Act, and ancillary aids to statutory construction. The court initially reviewed the conflicting decisions of the Tenth Circuit in *Stauffer I* and the Ninth Circuit in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1260 (9th Cir. 1981). (Pet. App. 15a-16a; 684 F.2d 1182-83.) Its assessment of the lan-

[12] Because Judge Siler joined the portion of Judge Weick's oipnion which dealt with this issue, it will be denominated as the "court's" or as the "Sixth Circuit's" ruling.

[13] In *Amax Coal*, this Court also construed the term "representative" as it is used in the National Labor Relations Act.

guage of Section 114(a)(2) and of the issues presented reflects the prior analyses by the courts in *Stauffer I* and *Bunker Hill*. The Sixth Circuit observed that perfect internal consistency could not be attained among the various provisions of the Clean Air Act.[14] Then, the court turned to the specific legislative history of Section 114(a)(2). The court noted that in the pertinent House and Senate Committee Reports, the terms "authorized representative" and "officers and employees" were treated as being identical in meaning. Both were understood to refer to "DHEW personnel;" neither was intended to refer to private contractors. (Pet. App. 18a-19a; 684 F.2d 1183-84.) (The Department of Health, Education, and Welfare administered the Act prior to EPA's formation.)

The court also attempted to determine which of the alternative meanings would be most consistent with the various other provisions of the Clean Air Act that use the phrases "authorized representative" or "officers and employees." (Pet. App. 20a-26a; 684 F.2d 1184-86.) Though perfect harmony among the provisions was impossible, the court found that substantial difficulties were created if "authorized representative" in Section 114(a)(2) was defined to include anyone other than EPA employees. For example, Section 114(d) directs "the Administrator (or his representatives)" to give notice to the relevant state agency before making an inspection under Section 114(a)(2).[15] The court concluded "that Congress would not have intended to entrust this kind of sensitive intergovernmental communication to employees of private

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[14] The Act has become known as one of the Nation's most complex and subtle pieces of legislation. While part of the reason for this distinction is attributable to the Act's numerous detailed provisions, part of the difficulty in construing many of the Act's provisions stems from considerations of legislative drafting. This case falls in the latter category. The word "representative" is used three times in Section 114, in subsections (a)(2), (c), and (d), and each time the word in context could have a different meaning.

[15] Both the inspection in Wyoming and that in Tennessee were designed to audit state monitoring and enforcement efforts.

contractors." (Pet. App. 21a; 684 F.2d 1184.)[16] Also, in Section 206(c) of the Clean Air Act, Congress authorized "officers and employees" of EPA to enter the plants of motor vehicle manufacturers for testing vehicles or engines. Nothing in the legislative history of the two sections suggested that Congress meant to give EPA broader authority with regard to inspections under Section 114 than under Section 206. To the contrary, the legislative history suggested that the use of the two different terms was nothing more than a drafting accident, and that the two facially different terms were intended to have identical meanings. The court found it more logical to assume that Congress meant to harmonize the inspection and entry power under both sections, thereby limiting it to only EPA officers and employees. (Pet. App. 23a-26a; 684 F.2d 1185-86.)

The Sixth Circuit found further support for its reading of Section 114(a)(2) in the legislative history of the 1972 amendments to the Federal Water Pollution Control Act ("Clean Water Act"). Section 308 of the Clean Water Act, 33 U.S.C. § 1318, was enacted approximately 18 months after Section 114 of the Clean Air Act, and was taken virtually word-for-word from Section 114. Regarding the matching provision of the Clean Water Act, the Senate report on the bill which was the basis for final enactment stated:

> It should also be noted that the authority to enter, as under the Clean Air Act, is reserved to the Administrator and his authorized representatives which

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[16] The court decided that the word "representative" when used in Section 114(c) did mean someone other than officers and employees of the Agency. (Pet. App. 21a-22a; 684 F.2d 1184-85.) Section 114(c) allows EPA's Administrator in specified circumstances to disclose confidential information, however obtained by the Agency, to "other officers, employees or authorized representatives of the United States." This Section thus on its face covers at least people at other federal agencies (*e.g.*, federal judges, attorneys at the Department of Justice and U.S. Attorneys, and Coast Guard officers and officials) and may reach more broadly than that.

> *such representatives must be fulltime employees of the Environmental Protection Agency.* The authority to enter is not extended to contractors with the EPA in pursuit of research and development.
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> S. Rep. No. 414, 92d Cong., 2d Sess. (1971), *reprinted in* 1972 *U.S. Code Cong. & Ad. News* 3668, 3729 (emphasis added).

The court found this legislative statement of intent to be convincing, based on the close connection between the Clean Air and Clean Water Acts and the very short period of time that had elapsed between passage of the Clean Air Act and issuance of the report on the Clean Water Act. (Pet. App. 26a-29a; 684 F.2d 1187-88.)

The Sixth Circuit rejected EPA's claim that Congress, by its inaction, had somehow ratified EPA's use of private contractors in conducting inspections. (Pet. App. 31a-32a; 684 F.2d 1189.)

The Sixth Circuit also observed that "the execution of search warrants is a traditionally governmental function." (Pet. App. 33a; 684 F.2d 1189.) Its decision comports with the general principle that, absent specific direction by Congress, the governmental functions of inspecting private premises and executing search warrants should be carried out by government employees only. *See Steele* v. *United States* (No. 2), 267 U.S. 505 (1925); *Bock* v. *Perkins*, 139 U.S. 628 (1891); *United States* v. *Gannon*, 201 F.Supp. 68, 73 (D. Mass. 1961). Here, there is no specific mandate from Congress in derogation of the common law. *See Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 263 (1979); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *Shaw* v. *North Pennsylvania R.R.*, 101 U.S. 557, 565 (1980).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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March 23, 1983

APPENDIX A

STAUFFER CHEMICAL COMPANY'S AFFILIATES AND SUBSIDIARIES NOT WHOLLY OWNED

Cornwall Chemicals, Limited
Derivados Macroquimicos, S.A.
Electroquimica Potosi, S.A.
Fluorex, S.A.
Halocarburos, S.A.
Industrias Quimicas de Mexico, S.A.
Industrias Quimicas Serpiol, S.A.
Kali-Chemie Stauffer G.m.b.H.
Kashima Industries Company
Limanol, S.A.
Montrose Chemical Corporation of California
Mount Pleasant Chemical Company
Pacific Chemical Industries Pty., Ltd.
Promotora, I.Q.S.A.
Quimica Lucava, S.A.
Stauffer Australia Limited
Stauffer Chemical Company (New Zealand), Limited
Stauffer Chemical Company of Wyoming
Stauffer Rioplatense S.A.I.C.
SWS Silicones Corporation
Texas Alkyls Belgium, S.A.
Texas Alkyls, Inc.
Toyo-Stauffer Chemical Co., Ltd.